

BEFORE THE OTAGO REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER Resource Consent Applications

RM16.093 by
Criffel Water Limited

and

RM18.345 by
Luggate Irrigation Company
Limited and Lake McKay Station
Limited

**STATEMENT OF EVIDENCE OF MARIA BARTLETT
FOR TE RŪNANGA O ŌTĀKOU, KĀTI HUIRAPA RŪNAKA KI
PUKETERAKI AND TE RŪNANGA O MOERAKI**

Dated 15 OCTOBER 2019

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Introduction

1. My name is Maria Bartlett.
2. I am currently employed as Project Manager Wai Māori in the Mana Taiao team within Aukaha (1997) Limited (Aukaha), which is owned by kā Papatipu Rūnaka ki Otago (Kā Rūnaka), representing mana whenua of the Otago region.
3. Prior to taking up this role, I held the position of Senior Policy Advisor within the Te Whakaariki/Strategy & Influence team at Te Rūnanga o Ngāi Tahu (Te Rūnanga), the iwi authority based in Ōtautahi/Christchurch.
4. Over my eight years with Te Rūnanga I was closely involved with tribal response to successive reforms of the Resource Management Act and National Policy Statement for Freshwater Management (Freshwater NPS), working at the national level and across the tribal structure to improve freshwater management and freshwater outcomes in the Ngāi Tahu takiwā, within the context of Te Tiriti o Waitangi.
5. I joined Te Rūnanga as a consequence of the Tuia programme, established to strengthen the relationship between Environment Canterbury and Ngā Papatipu Rūnanga ki Kā Pākihi Whakatekateka o Waitaha, representing mana whenua of the Canterbury region. Prior to this I had spent a decade working for Environment Canterbury (the Canterbury Regional Council) as a resource consents planner, including a period on secondment to Parliamentary Services with Hon. Marian Hobbs in her time as Minister for the Environment.
6. During my time with Environment Canterbury I worked consistently on water allocation, with a particular focus on the Waitaki Catchment and South Canterbury.
7. I hold a bachelor's degree in Literature and Linguistics and a Graduate Diploma in Political Science (with Distinction) from the University of Canterbury, including studies of colonialism, nationalism and NZ public policy.
8. I am currently a certified RMA decision-maker.
9. In preparing this evidence I have reviewed:

- a. The reports and statements of evidence of other experts giving evidence relevant to my area of expertise, including:
 - i. Criffel Water Limited – Resource Consent Application (as amended)
 - ii. Luggate Irrigation Company Limited and Lake McKay Station Limited – Resource Consent Application (as amended)
 - iii. Pre-Hearing reports for both Applications
 - iv. Otago Regional Council S42a Report and Response to Questions
 - v. Evidence suite provided for Criffel Water Limited
 - vi. Evidence suite provided for Luggate Irrigation Company Limited and Lake McKay Station Limited
 - vii. Evidence of Dr Michael Stevens
 - viii. Evidence of Dr Rosemary Clucas
 - ix. Evidence of Paul Whyte
- b. Lindis River decision of the Environment Court¹
- c. Resource Management Act 1991
- d. National Policy Statement for Freshwater Management 2014
- e. Otago Regional Policy Statement 2019 – Partially Operative
- f. Regional Policy Statement for Otago 1998
- g. Otago Regional Council – Regional Plan: Water for Otago
- h. Ngāi Tahu Report 1991

¹ [2019] NZEnvC 166

- i. The Stage 1 Report on the National Freshwater and Geothermal Resources Claim 2012
 - j. The Stage 2 Report on the National Freshwater and Geothermal Resources Claim 2019
 - k. Te Rūnanga o Ngāi Tahu Act 1996
 - l. Ngāi Tahu Claims Settlement Act 1998
 - m. Te Rūnanga o Ngāi Tahu Declaration of Membership Order 2001
 - n. Ngāi Tahu Freshwater Policy Statement 1999
 - o. Kāi Tahu ki Otago Natural Resources Management Plan 2005
10. I have read the Code of Conduct for Expert Witnesses in the Environment Court Practice Note. This evidence has been prepared in accordance with it and I agree to comply with it. I state where I have relied upon the expertise of others. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.
11. My evidence covers the following matters:
- Kā Papatipu Rūnaka, mana whenua and matters relevant to the Ngāi Tahu tribal structure
 - Te Tiriti o Waitangi as it relates to freshwater management
 - Te Mana o te Wai
 - Luggate Creek flow and allocation regime
 - Mahika kai and taoka species
 - Over-allocation and restricted matters for decision-making
 - Existing use and clarifying uses in minimum flow conditions
 - Consent duration

EXECUTIVE SUMMARY

12. I understand the Kā Rūnaka² view that the current proposals for water use within the Luggate Creek catchment are a step along the path towards freshwater management that appropriately incorporates Kāi Tahu rights, interests and values.
13. The applicants are presently relying upon a regional planning framework that is considered deficient by mana whenua, and out of step with developments in freshwater management over the last decade.
14. Existing planning documents are under review in light of statutory changes and additional national direction. Through coming processes, I understand that Kā Rūnaka and Te Rūnanga will be advocating for provisions that strengthen delivery of Crown commitments to Kāi Tahu, working with new national instruments that include emphasis on matters of significance to iwi katoa, such as Te Mana o te Wai.
15. The requested term of consent of up to 35 years³ will span another generation of Ngāi Tahu whānui, potentially locking in a poor regime at a time when an improved regime, capable of better addressing matters of importance to mana whenua, is just around the corner.
16. I support the need for Kā Rūnaka to have confidence that any long term decision affecting this catchment supports the full range of Kāi Tahu rights, interests and values, particularly when establishing the relationship between abstraction, use and natural inflows of the waterbody.

² Note that the ‘k’ is used in place of ‘ng’ in Kāi Tahu dialect, which is used in this evidence when referring to the interests of Kā Papatipu Rūnaka ki Otago, whilst the ‘ng’ is used for wider Ngāi Tahu interests and in statutory references.

³ Noting that Criffel have acknowledged the Kāi Tahu preference for less than 35 years and are willing to consider a 25 year term as requested in the applicable iwi management plan for Otago region (referring to the evidence of Kate Scott and Dr Amanda Bell)

17. Against that background Kā Rūnaka seeks that any consents be granted for a term not exceeding ten years, as recommended in the section 42A report.
18. I understand that the minimum summer flow of 180l/s is proposed to apply below the confluence of the North Branch and Alice Burn, and on that basis this shorter consent term is supported, provided any consents are also subject to conditions that restrict abstraction such that:
 - a. The natural ratio of flows between the two branches is maintained – two thirds from the North Branch and one third from the Alice Burn;
 - b. Water taken shall be no more than half of the water flowing immediately upstream of the points of take; and
 - c. Allocation is granted for what is currently able to be used effectively or stored with existing capacity.
19. As recorded in submission and discussed with the applicants ahead of the formal processes now underway, it is the preference of Kā Rūnaka that a 300L/s minimum flow apply over the long term in this catchment. I anticipate that Kā Rūnanga will advocate for this minimum flow in the upcoming review of the regional water plan in accordance with the Council's Progressive Implementation Programme.

KĀ PAPATIPU RŪNAKA

20. I note that the submitter may be referred to as 'Aukaha' in documents provided by the council and applicants, but it is more correct to say that the submitters are the Papatipu Rūnaka on behalf of whom Aukaha submitted.
21. Working with Aukaha, Te Rūnanga o Ōtākou and Kāti Huirapa Rūnaka ki Puketeraki submitted on both applications, while Te Rūnanga o Moeraki participated only in the joint submission on the Luggate Irrigation Company Limited and Lake McKay Station Limited application (LIC/Lake McKay). As the submissions are closely aligned, addressing the same waterbody and with the same themes

expressed, this evidence is given on behalf of all three Papatipu Rūnaka (Kā Rūnaka) in relation to management of water within the Luggate Creek catchment as a whole. Where the evidence speaks to matters specific only to the Criffel Water Limited (Criffel) application, without reference to the LIC/Lake McKay application, this is on behalf of the two Papatipu Rūnaka that submitted on the Criffel application.

22. Te Ao Marama Incorporated (Te Ao Marama) were notified in relation to both applications. Te Ao Marama represents four Papatipu Rūnanga within the Murihiku/Southland area of the Ngāi Tahu takiwā with overlapping interests in the area relevant to these applications. Te Ao Marama did not lodge a submission. However, I note that the issues raised in submission by Aukaha on behalf of Kā Rūnaka ki Otago are issues of relevance to all mana whenua interests in the Luggate Creek catchment.
23. Te Rūnanga o Ngāi Tahu was identified as an affected party and duly notified of the LIC/Lake McKay application, but not the Criffel application. Notification of Te Rūnanga correctly recognises that the Mata-au/Clutha River catchment is a Statutory Acknowledgement Area under the Ngāi Tahu Claims Settlement Act 1998 (NTCSA) (see **Appendix One**). The Luggate Creek is a direct tributary to the Mata-au, which Kāi Tahu view as a significant part of the whole due to a ki uta ki tai (mountains to the sea) approach to the river system, similar to concepts of integrated catchment management. Te Rūnanga o Ngāi Tahu was not identified as an affected party in relation to the Criffel application. I do not understand what the differences are between the two applications which could have resulted in the Otago Regional Council concluding that Te Rūnanga is affected by the LIC/Lake McKay proposal but not the Criffel proposal. In my opinion the interests of Te Rūnanga are no less affected by the Criffel take than by the LIC/Lake McKay take, and the failure to identify Te Rūnanga as an affected party in relation to the Criffel proposal appears to be an error by the Council.
24. I am also aware that the Director General of Conservation and the Otago Fish and Game Council are in a similar position, having been identified as affected parties in relation to the LIC/Lake McKay proposal (and being duly notified for the application) but not having been notified in relation to the Criffel application. Counsel will address

- in submissions the implication for the Criffel application of a failure to notify parties that should have been notified.
25. Te Rūnanga elected not to submit on the LIC/Lake McKay application. On a case by case basis, Te Rūnanga will defer to mana whenua interests, as there is strong overlap between the interests of mana whenua and those of the tribal authority⁴. In the case of the LIC/Lake McKay application, I understand that Te Rūnanga determined that the interests of the tribe are sufficiently represented through Kā Rūnaka participation in the resource consent process.
 26. The legal authority of Kā Rūnaka is established in accordance with the Te Rūnanga o Ngāi Tahu Act 1996 (Te Rūnanga Act), Section 9, and the Schedule to the Te Rūnanga o Ngāi Tahu Declaration of Membership Order 2001 (Membership Order). Kā Rūnaka are each members of Te Rūnanga, the tribal authority representing the interests of Ngāi Tahu whānui as a whole. The respective takiwā of Kā Rūnaka is recorded in the Membership Order as follows⁵:

Te Runanga o Otakou

The takiwa of Te Runanga o Otakou centres on Otakou and extends from Purehurehu to Te Matau and inland, sharing an interest in the lakes and mountains to the western coast with Runanga to the North and to the South.

Kati Huirapa ki Puketeraki

The takiwa of Kati Huirapa ki Puketeraki centres on Karitane and extends from Waihemo to Purehurehu and includes an interest in Otepoti and the greater harbour of Otakou. The takiwa extends inland to the Main Divide sharing an interest in the lakes and mountains to Whakatipu-Waitai with Runanga to the south.

Te Runanga o Moeraki

⁴ Refer to the *Partially Operative Otago Regional Policy Statement 2019*, p5, and Te Rūnanga approach to consultation with Papatipu Rūnaka.

⁵ Note that the statute does not use macrons when referencing Kāi Tahu kupu (words), which differs from the remainder of this evidence.

The takiwa of Te Runanga o Moeraki centres on Moeraki and extends from Waitaki to Waihemo and inland to the Main Divide.

27. In this way, Kā Rūnaka are recognised as representing mana whenua within the area of these applications. As referenced in the text of the Statutory Acknowledgement Area (see **Appendix One**), the Mata-au is an ara tawhito (ancient trail) linked to pounamu trade and mahika kai resources, connecting whānau and hapū to the river and its resources through whakapapa. Tūpuna (ancestors) of the members of Kā Rūnaka travelled this river system, utilising kāika (settlements) and nohoaka (resting places), amongst which are those associated with the Luggate Creek catchment. I refer you to Section 3 of the *Kāi Tahu ki Otago Natural Resource Management Plan 2005* and the evidence of Dr Michael Stevens for more detail.

TE TIRITI O WAITANGI

28. I consider that every freshwater decision made within the Ngāi Tahu takiwā is made in the context of Te Tiriti o Waitangi and Crown commitments to Ngāi Tahu. As stated by Kā Rūnaka: “*the Treaty is not to be read down in any circumstances, and that all of the principles of the Treaty have relevance to resource use and management decisions within the Otago region*”⁶.
29. Crown commitments to Ngāi Tahu were explored through *Te Kerēme* (the Ngāi Tahu claim, *Wai 27*) and recorded in the findings of the *Ngāi Tahu Report 1991* of the Waitangi Tribunal. Investigations focussed on the “nine tall trees” of *Te Kerēme*, namely the eight regional purchases of Ngāi Tahu lands over two decades between 1844 and 1864, and Ngāi Tahu claims to mahinga kai resources (the ninth tree). In the words of the late Upoko Rakihia Tau, outlining his inherited understanding of the Treaty, the 1991 report records:

“Article Two of the Treaty would give protection to the Maori and this was to include the protection of Maori property rights, i.e.

⁶ *Te Mana o Te Wai – Te Wai Pounamu Case Study*, 2015, Appendix Three, p62

Rangatiratanga over our mahinga kai that we desired to retain [SIC]”⁷.

30. Waitangi Tribunal findings established failures of the Crown resulting in settlement between the Crown and Ngāi Tahu through the Ngāi Tahu Deed of Settlement and Ngāi Tahu Claims Settlement Act 1998 (NTCSA). This Act includes Statutory Acknowledgements such as that for the Mata-au, as well as an apology from the Crown to Ngāi Tahu, the full text of which is included as **Appendix Two**, with pertinent excerpts replicated here:

“The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu's use, and to provide adequate economic and social resources for Ngāi Tahu.

The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu's use and ownership of such of their land and valued possessions as they wished to retain.

The Crown recognises that it has failed to act towards Ngāi Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngāi Tahu saying ‘Te Hapa o Niu Tirenīl’ (‘The unfulfilled promise of New Zealand’). The Crown further recognises that its failure always to act in good faith deprived Ngāi Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb ‘Te mate o te iwi’ (‘The malaise of the tribe’).”

31. Following the Ngāi Tahu Settlement, the *Ngāi Tahu Freshwater Policy Statement 1999* has this to say about the status of freshwater resources within the Ngāi Tahu takiwā:

⁷ Preface to the Ngāi Tahu Report 1991

“Te Rūnanga o Ngāi Tahu wishes to state explicitly that it believes the issue of ownership of freshwater remains unresolved.”⁸

32. The *Kāi Tahu ki Otago Natural Resources Management Plan 2005* reiterates this point:

“The fundamental question of ownership of water resources remains unresolved.”⁹

33. I understand that this remains a consistent tribal position. Most recently, Ngāi Tahu have participated as an interested party in the NZ Māori Council led *Wai 2358* process exploring national freshwater and geothermal resources claims. In particular, the inquiry is seeking to answer the nature of rights and interests in water and geothermal resources that were guaranteed and protected by the Treaty of Waitangi. The Stage 1 report of the Waitangi Tribunal established that waterbodies were:

“taonga over which hapū or iwi exercised tino rangatiratanga and customary rights in 1840, and with which they had a physical and metaphysical relationship under tikanga Māori (Māori law). Their rights included authority and control over access to the resource and use of the resource. This authority was sourced in tikanga and carried with it kaitiaki obligations to care for and protect the resource ...”

Under Māori law, rights to these water bodies ... was demonstrated by what the claimants called the customary ‘indicia of ownership’ ... [We] agree that the claimant’s evidence has demonstrated the customary ‘indicia of ownership’, and that ‘full-blown’ ownership of property in the English sense was the closest legal equivalent for Māori customary rights in 1840.”¹⁰

⁸ Foreword by Tā Mark Solomon and Sid Ashton, Kaiwhakahaere and CEO respectively at the time of finalising the policy statement, p3

⁹ Wai Māori General Issues, Section 5.3.2, p59

¹⁰ *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, p76, Waitangi Tribunal, 2012

34. This year the Stage 2 report was released, acknowledging progress between the Crown and Māori since the earlier phase of the inquiry, but highlighting remaining disparities in position, and reiterating that “*the present law in respect of fresh water is not consistent with Treaty principles*”¹¹. The report finds that Māori have been prejudiced by breaches in practice, including “*the failure to set adequate controls and standards for the active protection of their freshwater taonga*”¹². A tendency to “balance out” Māori interests altogether in RMA decisions is referenced as a prejudicial action¹³. The report records:

*“Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making.”*¹⁴

35. Solutions are recommended by the Waitangi Tribunal relating to water allocation and picking up on the work of the Land and Water Forum specific to addressing Māori rights, interests and values in freshwater¹⁵. Te Rūnanga o Ngāi Tahu has been a contributing member of the Land and Water Forum¹⁶. Government response to the Waitangi Tribunal findings includes the current “*Essential Freshwater*” programme, which proposes to amend national direction and particularly the National Policy Statement for Freshwater Management (Freshwater NPS), progressing some of the matters raised in the Tribunal reports.

¹¹ Letter of Transmittal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim*, Waitangi Tribunal, 2019

¹² *Ibid*, p523-4

¹³ *Ibid*, p525

¹⁴ *Ibid*, p528

¹⁵ *Ibid*, Section 7, p559

¹⁶ David Perenara-O’Connell, Te Rūnanga representative for Te Taumutu Rūnanga and my initial manager at the Office of Te Rūnanga, represented Te Rūnanga o Ngāi Tahu around the Land and Water Forum table

36. While the limitations of the RMA are canvassed at length in the *Wai 2358* reports, the reports also highlight the significance of Part 2 of the RMA as it relates to Māori rights, interests and values, and of the Freshwater NPS and associated national direction. Evident throughout, in my view, is a sense of slow progress over time as iwi katoa and successive governments work to address deficiencies, even as it is acknowledged that more needs to be done.
37. The Preamble to the National Policy Statement for Freshwater Management 2014 records that:

“The Treaty of Waitangi/Te Tiriti o Waitangi is the underlying foundation of the Crown–iwi/ hapū relationship with regard to freshwater resources. Addressing tangata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water, are key to giving effect to the Treaty of Waitangi.”

Objective D1 and Policy D1 are focussed on identifying and reflecting tāngata whenua values and interests in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning.

38. The parts of the *Regional Policy Statement for Otago 1998* that relate particularly to Kāi Tahu rights, interests and values (including *Chapter 2 – Treaty of Waitangi*, *Chapter 4 – Manawhenua Perspective*, and elements of *Chapter 5 – Land* and *Chapter 6 – Water*) have been overtaken by the *Partially Operative Otago Regional Policy Statement 2019 (Otago RPS 2019)*.
39. The Otago RPS 2019 contains updated reference to Te Tiriti o Waitangi (the Treaty), noting that the Treaty is a higher order instrument in relation to the RMA¹⁷. Five Treaty Principles are specifically referenced, which I believe can assist application of Section 8 of the RMA. Also mentioned is the Treaty partnership itself, manifested through the relationship between Otago Regional Council

¹⁷ *Partially Operative Otago Regional Policy Statement 2019*, Statutory Framework Diagram, p2

and Kāi Tahu rākatira¹⁸. Expressing kaitiakitaka, and recognising Kāi Tahu interests and values is one of the five stated outcomes identified for the region (Part B, Objective 2), which includes ensuring that iwi management plans are taken into account (Policy 2.1.2) and supporting Kāi Tahu well-being by recognising and providing for customary uses and cultural values (Policy 2.2.1, Schedules 1A and B). **Appendix Four** includes reference to relevant iwi management plan material and policies from both the *Kāi Tahu ki Otago Natural Resources Management Plan 2005* and the earlier *Ngāi Tahu Freshwater Policy Statement 1999*, additional to those that are further discussed in the planning evidence of Paul Whyte.

40. The current operative *Regional Plan: Water for Otago* references the Treaty in outlining the requirements of Part 2 of the RMA and the NTCSA, and in discussion of legislative change¹⁹. Issues of significance to Kāi Tahu are recorded in *Chapter 4 – Kai Tahu ki Otago Water Perspective* [sic] but there are no corresponding objectives and policies in this chapter. I refer you to the evidence of Paul Whyte for discussion of the connections within the plan to this chapter. In her planning evidence for Criffel, Kate Scott notes that Kāi Tahu issues are cross-referenced in chapters relevant to freshwater management²⁰. I find that in practice there is limited scope for Kāi Tahu to address these issues working with the restricted discretionary rule. The origins of the regional plan date back to 1998, although the plan first became operative in January 2004. Two decades have passed since its inception, during which time I observe there have been significant changes in the superior planning documents I refer to above, and in our collective understanding of how the relationship of Māori with water needs to be understood and protected in accordance with the principles of the Treaty. The evidence of Paul Whyte and legal submission provide further discussion in relation to application of the statute, national and regional planning framework.

¹⁸ *Ibid*, p4-5, with reference to principles of rākatairataka, active participation in decision-making, active protection of Kāi Tahu interests, the development right of Kāi Tahu and partnership.

¹⁹ *Regional Plan: Water*, p4-4

²⁰ Paragraph 90 of the brief of evidence of Kate Scott

41. Based on the various provisions of the instruments I have referred to above, in my opinion, decision-making in relation to the Luggate Creek must recognise and provide for Kāi Tahu relationship with this catchment, its lands, water, sites, wāhi tapu and other taonga, and associated culture and traditions. (The evidence of Dr Michael Stevens provides relevant detail.) The nature of that relationship is described in the evidence of Dr Michael Stevens and is as the Waitangi Tribunal describes it, with reference to Ngāi Tahu statements recorded through *Te Kerēme*, in relevant iwi management plans and through the recent *Wai 2358* process.
42. I consider that decisions on these applications must have regard to kaitiakitanga, which is the active responsibility of mana whenua in relation to this catchment. Recognised principles of Te Tiriti o Waitangi must also be taken into account, including those referenced in the Otago RPS 2019. I note in particular the principles of rakatirataka (the right to manage resources and exercise kaitiakitaka), partnership (relevant to the relationship of mana whenua with Otago Regional Council as resource managers), active protection of Kāi Tahu interests, and the development principle that requires consideration of the need for Kāi Tahu to adapt to modern circumstances.
43. When considering the Luggate Creek catchment applications, I consider that it is important to be mindful of the origins of these allocations of water. The Criffel application notes that the original permits were granted between 1887 and 1904²¹. The LIC permits were also first issued in the 1890s²², making them all of a similar vintage. The Lake McKay permits, however, are from midway through the second half of the 20th century.
44. Given that these allocations of water and the conditions under which they can be exercised have, until now, never been considered under the sustainable management framework of the RMA, or with regard to the rights, interests and values of mana whenua, I believe these

²¹ Schedule to the original application which sought to replace the full deemed permit allocation of 601.8L/s

²² Brief of Evidence of Mike Kelly, paragraph 17

applications are important from the mana whenua perspective. I understand that mana whenua have spent over a century repeatedly articulating Kāi Tahu rights, interests and values, and describing the impacts of degradation and loss in relation to treasured lands, waters and resources, including in the Mata-au. These applications represent the first opportunity for those rights, interests and values, as they apply in the context of the Luggate Creek, to be understood and reflected in the nature of the consents that are granted.

45. My view is that what is being sought in relation to these applications is the first step in rebalancing the imbalance created when the rights to take water were first granted, both for the waterbody and for Kāi Tahu. While full remedy and redress undoubtedly rests with the Crown and efforts at the national level, there is need for resource consent decision-making to take a restorative step here. Rather than “balancing out” Kāi Tahu rights, interests and values in any decision, listening to what mana whenua are seeking here and ensuring that the decision clearly reflects Treaty principles, in accordance with statutory documents, has the potential to make a difference. It is also important to understand, I believe, that there are further steps to be taken through coming legislative reforms and regional planning changes, such that decisions on these applications should be thought of as an interim step.

TE MANA O TE WAI

46. The concept of Te Mana o Te Wai was first formally introduced into the legal framework for the management of freshwater in the 2014 version of the Freshwater NPS, described as a korowai (cloak) in the Preamble. Subsequently, the concept was reinforced through Objective AA1, introduced in 2017. While at Te Rūnanga, I contributed to the work of the Iwi Leaders Group technical advisors that saw the introduction of these provisions²³, and in 2015 co-authored the Ministry for the Environment funded Te Mana o Te Wai

²³ Working with Donna Flavell (currently Chief Executive of Waikato-Tainui) and former Kaiwhakahaere Tā Mark Solomon, and latterly Rakihia Tau (son of Rakihia Tau Snr who was responsible for lodging *Te Kēreme*, the Ngāi Tahu claim).

case study²⁴ with Riki Ellison, who is a member of the Kahui Wai Māori now informing further amendments to the Freshwater NPS. The Southland Water and Land Plan, currently under appeal in the Environment Court, is to my knowledge the first regional plan to explicitly incorporate Te Mana o te Wai. I had the privilege of working with Ailsa Cain, then of Te Ao Marama, during drafting of the relevant text in that plan and look forward to reading the decision of the Court in due course.

47. Kā Rūnaka have recently reinforced, through discussions in the Otago regional planning context, that Te Mana o te Wai requires putting the needs of the waterbody first. As regional planning changes progress in this region, mana whenua will continue to articulate what Te Mana o te Wai means within Otago. Included in **Appendix Three** is an excerpt from Appendix Two of the summary report of the 2015 Te Mana o te Wai case study which captures Kā Rūnaka expression of Te Mana o te Wai. Noteworthy is the identification of practical means of affirming mana and rākatairataka, which includes reinstatement of cultural icons, such as mahika kai, and reaffirming cultural connection and expertise. I believe this is particularly relevant to consideration of the evidence of Dr Michael Stevens and Dr Rosemary Clucas.
48. The health of the water as the first priority to the waterbody is adopted as a theme in the Freshwater NPS²⁵ (amended 2017) and further reinforced in the draft Freshwater NPS 2019²⁶. This is consistent with longstanding policy captured in the *Ngāi Tahu Freshwater Policy Statement 1999*, which is incorporated into the *Kāi Tahu ki Otago Natural Resources Management Plan 2005* (Otago IMP 2005). While there are differences between the government and Kāi Tahu expression, there is a core intent to think first about the waterbody. I note that on page 18 of the 1999 policy statement is an ordered set of eight priorities to consider when developing water allocation regimes,

²⁴<https://iwichairs.maori.nz/wp-content/uploads/2015/06/Case-Study-Te-Waipounamu-Te-Mana-o-Te-Wai-June-2015.pdf>

²⁵ Freshwater NPS, p7

²⁶ Action for Healthy Waterways – a discussion document on national direction for our essential freshwater, p28

beginning with sustaining the mauri of the waterbody and ending with abstraction for economic use. Within the Wai Maori General Objectives of the Otago IMP 2005 are the aims that the spiritual and cultural significance of water to Kāi Tahu will be recognised, that unresolved issues surrounding water ownership will be addressed, and flow regimes will be consistent with cultural values²⁷, with an accompanying policy that the mauri of all water will be protected and restored.

49. I note that impact on mauri is recorded in the S42a report as reason for notifying the Criffel application to Aukaha (formerly Kai Tahu ki Otago Limited) and Te Ao Marama, and is also the reason for notifying both parties in relation to the LIC/Lake McKay application. Impacts on cultural and spiritual values are cited as reasons for notifying Te Rūnanga o Ngāi Tahu in relation to the LIC/Lake McKay application. The S42a report appropriately draws on reference to spiritual and cultural beliefs, values and uses associated with the Mata-au in Schedule 1D of the regional plan²⁸ in relation to the Luggate Creek catchment. This reference in the schedule is intended to apply throughout the Mata-au system²⁹. Policies from *Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008 (Te Tangi a Tauira – the Cry of the People)* and *Kāi Tahu ki Otago Natural Resource Management Plan 2005* are referenced, with the reporting officers recording that the regional plan is yet to be amended to incorporate these plans.

FLOW AND ALLOCATION REGIME

²⁷ *Kāi Tahu ki Otago Natural Resources Management Plan 2005*, p60-61

²⁸ Combined S42a report, p15.

²⁹ This answers the point made in paragraph 100 of the Brief of Evidence of Kate Scott. I note that there are other sub-catchments within the Mata-au system singled out in the schedule, however the whole of the Mata-au catchment holds the specified values so the absence of a tributary in the schedule list should not be taken as an absence of values. The evidence of Dr Michael Stevens provides relevant information to understand this point.

50. The Māta-au specific objectives and policy in the Otago IMP 2005, building on the general Wai Wāori objectives and policies, reference the impact of damming in the catchment and the need for flow regimes to mimic natural flows³⁰.
51. In order for this policy to carry through into decision-making, there is a need to first understand what the natural flows of the waterbody are, which is a challenge in modified hydrological settings such as exists in Luggate Creek catchment where the Criffel weir controls north branch flows. Flow records are also limited, with variable estimates of naturalised flow included in the applications and regional council reports. I note here that in the affidavit of Ian Jowett there is discussion of the nature of habitat-based methods for setting flow regimes, which are less concerned with the “natural flow paradigm”³¹. This provides some explanation for the disparity between the Kāi Tahu policy approach regarding the flow and allocation regime and the applicants’ approach in reference to the advice of Ian Jowett.
52. From the Kāi Tahu perspective, it is important to look at what we can observe of the natural hydrology. There are significant differences between 7-Day MALF (mean annual low flow) estimates for the Luggate Creek at the State Highway bridge. The S42a report favours an estimate of NIWA’s Shiny hydrological model (367L/s)³² which is 180L/s lower than the favoured Otago Regional Council estimate at the time minimum flows were set in the catchment (550L/s)³³ and 270L/s lower than the data referenced by Matt Hickey³⁴. Regardless, these estimates indicate that the summer minimum flow of 180L/s in the regional plan is set at somewhere between 28 – 49% of the naturalised 7-Day MALF, which is lower than current Cawthron

³⁰ Ibid, p129

³¹ Affidavit of Ian Jowett, p14-15 of his report *Fish Habitat in Luggate Creek*, 2019

³² Section 42a Report, Appendices 3 and 4

³³ *Management Flows for Aquatic Ecosystems in Luggate Creek*, Otago Regional Council, August 2006

³⁴ Brief of Evidence of Matt Hickey, paragraph 27

recommendations³⁵. Dean Olsen references 210L/s as the 1 in 5 year low flow at the State Highway bridge using NIWA's Shiny model, whilst also acknowledging there may be issues with accuracy of the model, and certainly Matt Hickey in his evidence prefers the 2006 estimate of the ORC. The 180L/s minimum flow would represent roughly four fifths of the 1 in 5 year low flow if the Shiny figures are favoured. As noted by Matt Hickey, 180L/s is a significant improvement on substantial dewatering of the creek historically, however I note that it remains unclear to what extent this flow would appear naturally in the waterbody³⁶. I expect that a longer record of flow data will progressively improve confidence and understanding in relation to the natural range of the waterbody at low flows, which those with hydrological expertise present at the hearing can comment on.

53. The decision-making panel on Proposed Plan Change 1B (Minimum Flows) did not record a scientific rationale for the summer minimum flow when it was set in 2009³⁷, recording instead:

"We note that the proposed minimum flow regime of 180/s (November to April) and 500L/s (May to October) was developed in conjunction with the Luggate community. During the April 2008 workshop, the community identified their preference for "real data" and suggested the actual flow at the time of the meeting was appropriate. The Council then gauged river flow and found it to be 180L/s. Workshop and working group participants (including representatives from Council, Fish and Game Otago and the Department of Conservation) agreed the observed flows would provide for out-of-stream values while sustaining the catchment's instream values."

54. Kāi Tahu rights, interests and values are noticeably absent from consideration at the time of the minimum flow decision. This is despite

³⁵ Brief of Evidence of Matt Hickey, paragraph 24

³⁶ Table 3 in the evidence of Matt Hickey records no natural instances of the 180L/s minimum flow in the recent flow record

³⁷ *Otago Regional Council's Decisions on Proposed Plan Change 1B (Minimum Flows) to the Regional Plan; Water for Otago*, 31 October 2009, p6

Schedule 2D in the regional plan making reference to the need for consideration of “any other relevant matter in giving effect to Part 2 of the Resource Management Act”. Kāi Tahu rights, interests and values naturally connect to the purpose and principles of the RMA in Part 2³⁸, so I believe this requirement in the regional plan provided an appropriate platform to have incorporated these matters in to the minimum flow decision. It is my understanding that there was no Kāi Tahu representation at the April 2008 workshop at which the minimum flow was effectively set.

55. It is worth responding here to the evidence of Dr Amanda Bell as it relates to interactions with Aukaha, and formerly Kāi Tahu ki Otago, about the flow and allocation regime. Constructive and like-minded discussions occurred following limited notification, with positive interactions around riparian management, water quality, cultural associations with the catchment, and potential for mahika kai restoration. The primary points of friction that emerged were around matters associated with water quantity, including the significant size of the allocation block, the low minimum flow and approach to residual flow³⁹. I note that the last meeting with the applicants, ahead of proceeding in to the pre-hearing processes, was the first in which all parties with an interest in the catchment were present to discuss the issues⁴⁰, and at that time the applicants were unmoved from the original application positions which totalled over a cumec in requested allocation, up to the maximum level provided for in the regional plan. There were no signs at that time of intention to reduce requested

³⁸ Section 5 is relevant to the economic, social and cultural well-being of Kāi Tahu in connection with the natural environment. Section 6 is relevant to Kāi Tahu relationship with lands, waters and taonga. Sections 7 and 8 are relevant to application of Treaty principles and kaitiakitanga.

³⁹ In that regard, I note that in paragraph 33 of the Brief of Evidence of Dr Amanda Bell the size of the allocation block is missing as an issue.

⁴⁰ Attendees included Colin Harvey, Mike Kelly and Sarah the station manager representing LIC/Lake McKay, Mandy Bell, Bridget Irving and Matt Hickey representing Criffel, Nigel Paragreen of Fish and Game Otago, Trudy Anderson of DOC, and Kathryn Gale and myself from Aukaha.

allocation and repeated assertions that there was no problem with the minimum flow, the size of the allocation block or reliance on the proposed seasonal volume to manage abstraction⁴¹. Aukaha staff were relying on the application material to understand the proposals, including in the case of Criffel the David Hamilton report appended to their application, which the applicant has now progressed from. Although the applicant insists that Aukaha failed to articulate reasons for dissatisfaction with the minimum flow⁴², this does not recognise repeated references to the council report of 2006⁴³ and deficiencies with the council decision on the minimum flow⁴⁴.

56. I acknowledge the frustration for Criffel at having been a long time in process to find that response from Aukaha changed. This reflects developments within Kā Tahu since 2016, as well as developments at the national and regional levels regarding freshwater management planning and practice relating to Kā Tahu rights, interests and values. It was equally frustrating for Aukaha to experience the slow recognition by the applicants of issues with the ratio of proposed abstraction to natural inflows, and firm reliance on what Kā Rūnaka consider to be a deficient regional planning framework. Progress through the pre-hearings is a testament to the efforts of the applicants and their consultants to work together at that stage and attempt to better address matters associated with allocation and flow. I know that Kā Rūnaka welcome the continued support of Criffel and Lake Mckay Station for reintroduction of tuna in the catchment, and enthusiasm for cultural associations, riparian management and water quality management expressed throughout engagement.

⁴¹ The proposed Criffel seasonal volume of 8,358,376m³ would have enabled abstraction of up to 456L/s for 24 hours every day between 1 October and 30 April

⁴² Paragraph 33 of the Brief of Evidence of Dr Amanda Bell

⁴³ *Management Flows for Aquatic Ecosystems in Luggate Creek*, Otago Regional Council, 2006

⁴⁴ Refer to paragraph 53 above

57. As it stands, hydrographs now provided by the applicants⁴⁵ show the relationship between the proposed abstraction regime (incorporating a 538L/s primary allocation block, a 250L/s supplementary block when the recorder site measures above 788L/s and a further 166L/s supplementary block when the recorder site measures above 1038L/s) and flow information recorded since 2016, also utilising measured abstraction data from that time. The 2016 hydrograph shows a two month period where the waterbody is at or below the minimum flow for up to three weeks at a time, which is understood to be representative of a drier year, with around a 1 in 10 year return period. The applicant indicates that this is the best information we currently have about the relationship of abstraction to natural inflows, whilst being only three years of recorded data⁴⁶.
58. I do not consider that the minimum flow in relationship with the proposed abstraction regime mimics natural flows in the way that Kā Rūnaka are seeking. It is not clear under the regional planning settings that the needs of the waterbody have been prioritised in establishing the flow and allocation regime, and therefore the spiritual and cultural significance of the Luggate Creek catchment to Kāi Tahu has not been appropriately recognised. Cultural rights, interests and values must be identified to ensure that these are supported by the proposed regime, in order to provide confidence, for instance, that mauri will be protected and enhanced, taoka species provided for and mahika kai values supported. Consideration of unresolved issues associated with water ownership, as detailed in the Te Tiriti o Waitangi section of this evidence, is bound together with consideration of mauri and mahika kai. I believe that the way in which rights, interests and values are reflected in decisions on the flow and allocation regime for this catchment has the potential to respect multiple dimensions of Kāi Tahu relationship with the waterbody.

⁴⁵ Evidence of Matt Hickey

⁴⁶ Refer to the evidence of Matt Hickey and Dr Amanda Bell.

59. The S42a report⁴⁷ and information included in evidence for the applicants⁴⁸ indicates that the north branch of Luggate Creek provides roughly two thirds of the naturalised flow, and the south branch (Alice Burn) the remaining third. Criffel propose a residual flow in the north branch below the Criffel weir of 90L/s, which is identified as the rate of seepage through the old structure⁴⁹. Abstraction by Luggate Irrigation Company Limited may occur below this, but the applicant has recently amended their residual flow requirement to be 100L/s in light of concerns raised on behalf of Kā Rūnaka⁵⁰, which is very welcome. The evidence of Matt Hickey indicates the residual flow below the Criffel weir will most likely provide two thirds of the minimum flow contribution⁵¹ and the evidence of Ben Trotter suggests that managing flow between the water users will result in up to 120L/s contributing to the minimum flow on the north branch. I believe that through this regime the applicants have consciously attempted to provide for Kā Tahu rights, interests and values. A flow and allocation regime that explicitly preserves the natural dominance of the north branch, equivalent to an approximately two thirds/one third ratio between the north and south branches, is in my opinion the appropriate way to reflect that intent and meet the expectations of Kā Rūnaka.
60. I believe that to provide Kā Rūnaka with certainty regarding this interim decision step on the path to Treaty compliant freshwater management, conditions will need to preserve the natural ratio of flows. These need not be expressed in hard numbers, provided the consent holders have a way of ensuring the natural ratios are maintained, which appears

⁴⁷ Section 42a, Appendices 3 and 4, p2

⁴⁸ Brief of Evidence of Matt Hickey, paragraph G

⁴⁹ Memorandum to Criffel Station from Richard de Joux, *Luggate Creek flow measurements 26 February 2015*, Environmental Consultancy Services Limited, 2015

⁵⁰ Brief of Evidence of Mike Kelly, paragraph 54 and Brief of Evidence of Ben Trotter, paragraph 16

⁵¹ Brief of Evidence of Matt Hickey, paragraph 80

feasible through flow sharing arrangements⁵². This method would need to be transparent to mana whenua, and able to be monitored and ultimately enforced if necessary by the Council. Ben Trotter offers the use of a staff gauge downstream of the north branch LIC take which is also welcome and could provide for this monitoring. In combination with the minimum flow recorder site it may well provide the means to track the ratio of flows from each branch.

61. The evidence of Dr Rosemary Clucas indicates that an interim regime of this nature would provide the confidence necessary to make progress in reintroduction of longfins in the catchment, although her preference is for a 300L/s minimum flow long term to support introduced populations. I note also that, in relation to protection and restoration of mauri, this is a good interim step, although the objective of lifting the minimum flow to a level that is within the natural range⁵³ of the waterbody remains. The Kā Rūnaka submission references 300L/s, which is expected to be closer to the natural range of the waterbody⁵⁴. I understand that decisions on these applications are likely to apply the regional plan minimum flow of 180L/s and therefore the implementation of a higher minimum flow will be addressed through the Council's Progressive Implementation Plan, as it goes about the task of bringing the regional water plan into alignment with national direction. I note here that from the earliest discussions with Criffel I raised the idea that shifting from the current regime to one that meets mana whenua objectives may take a couple of steps. Initially I had imagined we might reach agreement to those steps, incrementally implemented in consent conditions, to enable the applicant to achieve the longer term consent they desired, whilst addressing mana whenua objectives for the waterbody. As is still the case in evidence, the

⁵² Refer to Brief of Evidence of Matt Hickey, paragraph 91, and Ben Trotter, paragraph 16

⁵³ The 180L/s does not appear in figures for the natural range of the waterbody in the Brief of Evidence of Matt Hickey, Table 3

⁵⁴ Between 47% and 82% of the 7-Day MALF, referencing the NIWA shiny figure of 387L/s, the ORC 2006 figure of 550L/s and the figure derived from recorded data of 637L/s

applicant has remained averse to a short term consent. Without confidence that a higher minimum flow will be applied in the catchment, I believe a short term consent remains the best option to achieve what Papatipu Rūnaka are seeking.

62. My understanding is that the larger of the upper takes on the south branch of the creek operated by Lake McKay Station has the potential to provide for at least half of the natural inflows of the waterbody to pass the intake⁵⁵, with gains understood to occur below that point⁵⁶. It is my view that this approach should be applied at all points of take on the south branch, as it would at least ensure that at the points of abstraction the majority or almost all of the waterbody cannot be taken. I am concerned that given the lack of reliable hydrological statistics at this upper take point, a ‘hard’ number assigned to the residual flow in litres per second could produce inappropriately low residual flows and be hard to administer. In my opinion, a ratio approach to managing flows at this point may prove workable for the applicant whilst respecting the mauri of the waterbody.
63. I accept that this may not be as easy to implement in relation to the smaller tributary of the upper takes operated by Lake McKay Station, given the current infrastructure. However, paying attention to the principle of enabling an equal or greater share of the natural flows to pass the intake may, in my view, result in a practical solution at this site. At present, the applicant proposes no residual flow at this take point.
64. At the lower south branch intake point operated by Luggate Irrigation Company Limited, I understand that the race has naturalised such that the qualities of the stream and the race are indistinguishable where they diverge⁵⁷. Fish and Game Otago have requested that the race not be screened as the habitat is utilised by fish for spawning, and

⁵⁵ With reference to description and photographs of the intake provided by the applicant, although this will need to be explored further with Lake McKay

⁵⁶ Brief of Evidence of Matt Hickey, paragraph 93

⁵⁷ Kathryn Gale, Kairangahau Wai Māori at Aukaha, pers. comm 2019 following site visit

have asked for a minimum depth to be supplied in the race. Provided this preserves the natural ratio of contribution from the north and south branches of the creek and ensures at least an equal amount of water flowing through the natural watercourse of the south branch, I am able to support the requested approach to the race habitat. There may be times when the natural watercourse is given priority, but it is expected that there will be higher flows in the waterbody when fish are using the race for spawning, although Fish and Game Otago are best to consider that question. I note also that the 7D-MALF figures indicate 124L/s for this reach of the south branch⁵⁸, which would equate to ~60L/s down both the race and the natural watercourse at a 50:50 split using the NIWA Shiny numbers. Shiny appears to indicate lower flows than other 7D-MALF predictions in the evidence so may be conservative. The applicant is understood to have flexibility between the north branch and south branch take points, and to rely on flow sharing arrangements in low flow periods.

MAHIKA KAI AND TAOKA SPECIES

65. Within the priorities for allocation in the 1999 policy statement of Ngāi Tahu referenced earlier is “*protecting traditional cultural values and uses (in addition to its mauri)*”. Firstly, the mauri of the waterbody must be sustained, then the basic health and safety needs of humans, particularly drinking water, must be met. Following that, the policy highlights cultural values and uses, which includes mahika kai. In the simple terms of the Freshwater NPS 2014, taking care of the health of the waterbody is connected to care for the health of the wider environment and the health of the people.
66. The Otago IMP 2005 contains objectives and policies associated with mahika kai and biodiversity, which are relevant to Te Mana o te Wai in the Luggate Creek catchment. These include mana whenua management of mahika kai and identification of mahika kai sites of importance to Kāi Tahu. I highlight here the iwi management plan policy that requires Kāi Tahu participation in the “*management of*

⁵⁸ Refer to the evidence of Dean Olsen, Table 2

*mahika kai, both introduced and indigenous*⁵⁹. My understanding is that this policy recognises that mana whenua are gatherers of both introduced and indigenous species, particularly given that many historically harvested species are endangered or have been lost from habitats where they once were, which results on reliance on what is now there. I consider that the Otago RPS 2019 reference to the Treaty development right principle provides context for understanding and applying this policy.

67. The applicants have highlighted that the Luggate Creek is a trout dominated catchment⁶⁰, which I believe is a common story within the region. Kāi Tahu are working with both Fish and Game Otago and the Department of Conservation to explore, catchment by catchment, how to work with the environment as it is now. In this catchment, opportunity has been identified to work with longfins as outlined in the evidence of Dr Rosemary Clucas. Department of Conservation staff have also established through this process that there is a need to survey the south branch below the upper Lake McKay intake points, and above the Ciffel weir, to understand whether there are threatened galaxiids present⁶¹. While the Department has now withdrawn from the process, I highlight this to indicate that Kāi Tahu are supportive of this survey work occurring, which will help to inform options for catchment management into the future.
68. The evidence of Dr Michael Stevens provides understanding of the historical and cultural context for Kāi Tahu in this location, including patterns of occupation and use over time, and the natural economy upon which Kāitahutaka relied, including mahika kai. Tuna feature as a significant resource known to be harvested in the area. Dr Stevens also outlines the impact of alienation from lands and waters.

⁵⁹ *Kai Tahu ki Otago Natural Resource Management Plan 2005*, p67-68

⁶⁰ Brief of Evidence of Matt Hickey, paragraph C

⁶¹ Matt Hickey doubts their presence in this area in paragraph 96 of his evidence, while Richard Allibone considers they may be there or could be safely reintroduced there in paragraphs 21 -22 of his evidence

69. The evidence of Dr Rosemary Clucas describes the potential for restoration of tuna (eels) in Luggate Creek, which will very much depend on the setting of a flow and allocation regime that supports this endeavour. Providing for this restorative activity, to benefit a key mahika kai species in the Upper Clutha, will assist to remedy the consequences of alienation and loss that Kāi Tahu have experienced. I understand that Fish and Game Otago support the introduction of tuna in this catchment, as do the applicants and their consultants.

OVER-ALLOCATION

70. I consider that the primary allocation set for the Luggate Creek catchment under Policy 6.4.2(b) (and managed through associated Rule 12.1.4.4) represents over-allocation of the waterbody in the way that mana whenua understand that term. The Section 42A report calculates the figure to be 1024L/s, which is the sum of currently permitted takes in the catchment. I do not believe that this is an allocation of water that prioritises the waterbody. Based on the evidence of Dean Olsen this is likely to be greater than the median inflows of the waterbody at the State Highway bridge⁶², so lawful abstraction at this level could be expected to flatline the waterbody at the minimum flow for the majority of the irrigation season. I note that Kate Scott in her evidence discusses over-allocation as it is defined in the Freshwater NPS and concludes that at present there can be no over-allocation in the Luggate Creek catchment⁶³. In using the term here, I refer to the relationship between the sum of permit allocations in contrast to natural inflows of the waterbody, which can be thought of as natural limits. This is the way in which mana whenua understand the impact of water allocation and potential effects of abstraction, from the perspective of the waterbody itself. I disagree with Kate Scott's assessment that the regional plan seeks to control the issue of over-allocation and refer to my brief note below regarding the Environment Court decision on the Lindis River plan change.

⁶² Appendices 3 and 4 of the S42A report

⁶³ See paragraph 35 of the Brief of Evidence of Kate Scott

71. The planning framework as it stands enabled the applicants to apply up to the maximum of the primary allocation allowed in the regional plan, which was the situation until recent amendments that accompanied and followed the pre-hearing meetings. The proposed abstraction regime of the applicants is to now seek a combined primary allocation of 538L/s, for a combination of existing use and future development, which is close to half the maximum potential allocation⁶⁴. This is a significant improvement on the original applications. I acknowledge the steps that have been taken towards a more sustainable result for the waterbody. However, I consider that uncertainties remain about the impact of the proposed abstraction and flow regime when considered in conjunction with proposed supplementary allocations, utilising limited hydrological information (less than five years of recorded flows)⁶⁵, and the limited scope provided for decision-making in the regional plan. Alongside consideration of the minimum flow, I believe these matters warrant a short term consent approach.
72. Matters reserved for discretion by the regional council (Rule 12.1.4.8) do not include explicit consideration of Kāi Tahu rights, interests and values, and I believe make such consideration difficult in relation to the matters listed⁶⁶. Kāi Tahu are effectively limited to speaking about the effects of ‘residual’ remnants of a waterbody after abstraction has

⁶⁴ Noting however, that the 1024L/s figure has been assessed as more than Policy 6.4.2A may have allowed, as noted by Matt Hickey in his evidence at paragraph 50

⁶⁵ Within appendices 3 and 4 of the S42A report Dean Olsen has included tables which uses figures derived from the NIWA’s Shiny hydrological model, showing a median flow for the creek of 932L/s at the State Highway bridge. Flows at this level would readily accommodate the proposed primary allocation and minimum flow, even a 300L/s minimum flow. However, I believe the gathering of further recorded data over time will improve confidence in long term decisions regarding allocation and water harvesting given acknowledged limitations in the data, although the hydrologists are better able to elaborate on that.

⁶⁶ Note that the council assessments for both applications (Appendices 1 and 2 to the S42a report) do not mention Kāi Tahu or cultural values.

occurred, fish screening impacts on mahika kai and taoka species⁶⁷ and consent duration as tools to address the suite of issues of interest to mana whenua. I find it difficult to see how restricted discretionary decision-making in relation to these consents can progress the objectives of the partially operative RPS 2019 in relation to Kāi Tahu, the Freshwater NPS 2014 and its expectations regarding Te Mana o te Wai and tangata whenua interests, or the purpose and principles of the RMA, with reference to Section 6(e), 8 and 7(a).

73. Regarding the proposed supplementary allocation blocks, I understand that full utilisation of these will require some new on-farm storage in order to harvest higher flows within and outside the irrigation season⁶⁸, particularly for Criffel and Luggate Irrigation Company Limited. Given the long lead time to the expiry of deemed permits since the RMA came into force, I observe that the applicants have had the opportunity to invest in necessary infrastructure that would enable water harvesting and improve on-farm resilience in low flow conditions, whilst also potentially alleviating abstraction pressure on the waterbody during those times. I note that Lake McKay in particular have planned ahead with piping and storage over the last decade.
74. Supplementary allocation should only be granted where there is existing capability to effectively utilise or harvest higher flows, at a rate and volume that is consistent with that capability and existing storage capacity. Otherwise, my preference is for longer term decisions to be made regarding water harvesting once a new regional planning framework is in place that incorporates new national direction and any amendments to the RPS. Particularly given the presumption in favour of abstraction that permeates existing regional plan provisions, with little to balance this in relation to primary allocation in particular, which

⁶⁷ S42a fish screening recommendations related to the Criffel weir intake, the upper Lake McKay intakes and the Luggate Irrigation Company race above the measuring device are supported, to the extent that they also meet Fish and Game Otago requirements.

⁶⁸ Matt Hickey concludes that the second supplementary allocation block would require storage, whereas the first may enable opportunistic irrigation early in the season - paragraph 67 of his evidence

is fundamental to then calculating supplementary allocation. The waterbody itself and Kāi Tahu relationship with it is currently absent from the determinations regarding allocation.

EXISTING USE

75. Policy 6.4.2A is relevant to applications for the proposed primary allocation block of 538L/s. Applicants must provide proof of water taken in the previous five years, and link the requested amount to existing activities, with a focus also on efficiency gains. I understand that amendments to the applications have been made with this policy expectation in mind, which supports perpetuation of existing abstraction.
76. Existing abstraction and use is undoubtedly an important matter for the decision-makers to determine in applying the regional plan provisions. I note that it would appear to be the only means by which primary allocation itself is assessed. As observed by the Environment Court in its recent decision on a plan change for the Lindis River:

“The ORP:W [regional plan], which came into force on 1 January 2004, can barely be said to make any effort to manage water volumes in many Otago catchments (including the Lindis River) because in most cases the primary allocation of water for irrigation is simply set as the sum of all existing water takes granted in the catchment.”⁶⁹

The Court also states in paragraph [98] of its decision that the primary allocation block would be the sum of deemed permits until their expiry, which creates a timing issue. In this case, I understand that the applicants are proposing the primary and supplementary allocations to apply after the expiry of deemed permits.

77. I believe that to provide appropriately for Kāi Tahu rights, interests and values, including māuri and mahika kai, and in order to provide for the relationship of manawhenua with the catchment, consideration needs

⁶⁹ *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 166, 7 October 2019, para. 3

to be given to the relationship between the amount of water taken and natural inflows. The starting place in the regional plan is to provide allocation based on existing abstraction, and then provide some limited opportunity to think about Kāi Tahu rights, interests and values. As outlined earlier in this evidence, in relation to Kāi Tahu policy, Treaty principles, and Te Mana o te Wai, this is entirely the wrong way around. At present, in order to seek an improved regime, it appears Kāi Tahu must explore allocation by interrogating existing use, on-farm practices, determining what has verifiably been taken and what represents efficiency in future use. In my view, mana whenua should not need to have these skills in order to advocate for Kāi Tahu rights, interests and values in the establishment of water allocation⁷⁰.

78. At this stage, resolution of outstanding matters relevant to determining abstraction and existing use as it relates to primary allocation, I consider is for the regional council. I believe that rates and volumes for different uses should be separately specified in consent conditions, including allocation for stockwater and potable supply where this does not satisfy the requirements of S14(3)(b). In my opinion, it will be important to understand the rate at which water can continue to be taken for domestic and stockwater purposes in periods when the river is down to the minimum flow level.

CONSENT DURATION

79. I believe that duration of consent is a matter that Kāi Tahu is able to refer to in seeking to have Kai Tahu rights, interests and values addressed because it can be expected to have a material impact on the flow and allocation regime of the creek.

⁷⁰ Kā Rūnaka quoted in Te Mana o te Wai – Te Wai Pounamu case study 2015, p17: “we are expected to be experts or at least have a greater understanding than most in water science, hydrology, planning, policy development, Maori and community development, climate change, oil and gas exploration, local and central government process. I do not believe that there would be another profession where such a wide range of skills is required.”

80. The S42A report recommends a ten year duration, with the reporting officers noting that this would correspond with the outer limit for giving effect to the Freshwater NPS 2014⁷¹. I note that the first factor highlighted by the reporting officers as relevant in consideration of consent duration is meeting the sustainable management purpose of the RMA, within which Kāi Tahu rights, interests and values are matters to be weighed. The officers record the expectation that there will be changes in the regional planning framework affecting the catchment within the next ten years, including in relation to the current minimum flow. I support this recommendation, which corresponds with the request in the Kāi Tahu submission for a short term consent duration, to allow for a new regional planning framework to be established before longer term consents are given in the catchment. Alignment between the council recommendation and Kāi Tahu submission is a welcome response taken in the spirit of Treaty partnership.
81. I note that efficiency upgrades are incorporated into recommended conditions by the S42A reporting officers⁷², the impact of which will depend on investment factors identified by the applicants⁷³. While I acknowledge it is unlikely that much in the way of infrastructure improvements will be made during this period of consent, I am of the view that it is more important that the proposed resource consents only be considered for a longer term when a more robust planning framework, that includes incorporation of Te Mana o te Wai and provides for improved consideration of Kāi Tahu rights, interests and values, is in place. My view about the appropriateness of a longer consent term (potentially out to 25 years which is the maximum duration Kāi Tahu would support for any water permit given the potential for inter-generational impacts) would be different if the applicants accepted a condition that achieves what is sought from a

⁷¹ Section 42a report, p42

⁷² Proposed Condition 16 in relation to both applications, which outlines requirements for a Scheme Management Plan

⁷³ Refer to Paragraphs 123 and 168 of the Brief of Evidence of Kate Scott and the evidence of George Collier

short term consent. For instance, a condition that requires adherence to the relevant flow and allocation regime⁷⁴ in an operative regional plan, such that a more robust planning framework, as I envisage will emerge within the next decade, can apply immediately to these consents without the need for review. This would be similar to what I had originally envisaged as a solution in relation to a stepped regime in a longer term consent. My preference at that earlier stage was to see the 300L/s minimum flow explicitly referenced as applicable after a decade, allowing time for the applicants to transition themselves. While the applicants have not up to this point been amenable to such an approach, it may be worth exploring further with them in light of their adherence to seeking a longer term consent.

82. In my opinion, if the applicants will not agree to such a condition, their position is effectively that they want to have the benefit of the security of a long term consent which may well be out of alignment with a new plan regime that is just around the corner.

CONCLUSION

83. I believe that the Regional Plan: Water for Otago is failing Kāi Tahu and that its framework is deficient for considering replacement of deemed permit applications.
84. The flow of this evidence, from the bold scope of *Wai 2358* Waitangi Tribunal reports and national discussions about how to improve provision for iwi rights, interests and values in freshwater, to the limited matters for discretion provided for under the existing regional plan, indicates the extent to which regional decision-making is currently out of step with the general direction of travel in freshwater management, including those of higher order documents such as the Freshwater NPS and RPS which the Commissioners can place substantial weight on.
85. I consider that allocations of water granted in the late 1800s and early 1900s, or even in the second half of the 20th century, such as in the

⁷⁴ Incorporating minimum flow, any residual flow expectations and maximum allocations for abstraction and use.

Luggate Creek catchment, were made with little thought for Kāi Tahu rights, interest and values or the natural limits that protect spiritual, cultural and biological values of waterbodies. I believe this is perpetuated with primacy still given to existing water users through the current planning framework. Despite the years and generations that have passed since those early days, and despite some improvements that have been made, I note that we find ourselves today in Otago still in the position where a comprehensive planning regime that addresses the replacement of deemed permits in a way that respects Te Mana o te Wai and gives certainty to resources users remains elusive. Without doubt, as I see it, this is perpetuating Crown failures to uphold Te Tiriti o Waitangi over a century ago and represents “*failure to set adequate controls and standards for the active protection of [Kāi Tahu] freshwater taonga*”⁷⁵.

86. The passage below from the *Wai 2358 Stage 2 Report* describes what I understand to be the Kāi Tahu experience of the regional plan and processes for replacement of deemed permit replacement applications:

“Māori have been significantly prejudiced because they have been unable to exercise kaitiakitanga effectively in respect of their freshwater taonga, and their rights and interests have been excluded or considered ineffectively in freshwater decision-making.”⁷⁶

87. Over half of all deemed permits have already been processed, the vast majority non-notified, using the limiting provisions of the current plan. I note that Policy 6.6.3 of the RPW, in the Explanation states “*This policy establishes means to assist in the development of methods and strategies for the orderly transition from deemed permits, which expire in 2021, to resource consents.*” I do not believe that orderly transition can effectively be achieved while Kāi Tahu rights, interests and values are minimised within the existing planning framework.

⁷⁵ *The Stage 2 Report on the National Freshwater and Geothermal Resources Claim*, Waitangi Tribunal, 2019, p523-4

⁷⁶ *Ibid*, p528

88. However, the Section 42A report recommendation regarding consent duration, I believe, is a key way to improve the impact of these decisions on Kā Tahu. The decision-making panel are urged to strongly consider the recommendations of Kā Rūnaka in submission and the reporting officers in this regard.
89. I consider that short term consents should be granted only for what is currently able to be used effectively or stored with existing capacity, or in the case of proposed residential development, for the area of land that has already been rezoned⁷⁷ and only if other alternatives have been properly explored for supply of potable water to that development⁷⁸. Ensuring the ratio of natural flows is preserved in each branch of the creek over the term of these consents, whilst ensuring that abstraction is no more than half of the flow at each south branch take point, will assist the water users to transition to a flow and allocation regime that appropriately prioritises the waterbody.

DATED this 15th day of October 2019



Maria Bartlett
Aukaha on behalf of Kā Rūnaka

⁷⁷ Brief of Evidence of Mike Kelly, paragraph 23, indicates this to be a 12ha block

⁷⁸ Refer to the Brief of Evidence of Paul Whyte

Appendix One

Mata-au/Clutha River Statutory Acknowledgement Area

Note: The Ngāi Tahu Claims Settlement Act 1998 (NTCSA) does not make use of macrons when referencing Ngāi Tahu kupu (words), which differs from the remainder of this evidence.

Schedule 40 Statutory acknowledgement for Mata-au (Clutha River)

Statutory area

The statutory area to which this statutory acknowledgement applies is the river known as Mata-au (Clutha River), the location of which is shown on Allocation Plan MD 122 (SO 24727).

Preamble

Under section 206, the Crown acknowledges Te Rūnanga o Ngāi Tahu's statement of Ngāi Tahu's cultural, spiritual, historic, and traditional association to the Mata-au, as set out below.

Ngāi Tahu association with the Mata-au

The Mata-au river takes its name from a Ngāi Tahu whakapapa that traces the genealogy of water. On that basis, the Mata-au is seen as a descendant of the creation traditions. For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.

On another level, the Mata-au was part of a mahinga kai trail that led inland and was used by Ōtākou hapū including Ngāti Kurī, Ngāti Ruahikihiki, Ngāti Huirapa and Ngāi Tuahuriri. The tūpuna had considerable knowledge of whakapapa, traditional trails and tauranga waka, places for gathering kai and other taonga, ways in which to use the resources of the river, the relationship of people with the river and their dependence on it, and tikanga for the proper and sustainable utilisation of resources. All of these values remain important to Ngāi Tahu today.

The river was also very important in the transportation of pounamu from inland areas down to settlements on the coast, from where it was traded north and south. Thus there were numerous tauranga waka (landing places) along it. The tūpuna had an intimate knowledge of navigation, river routes, safe harbours and landing places, and the locations of food and other resources on the river. The river was an integral part of a network of trails which were used in order to ensure the safest journey and incorporated locations along the way that were identified for activities including camping overnight and gathering kai. Knowledge of these trails continues to be held by whānau and hapū and is regarded as a taonga. The traditional mobile lifestyle of the people led to their dependence on the resources of the river.

The Mata-au is where Ngāi Tahu's leader, Te Hautapunui o Tū, established the boundary line between Ngāi Tahu and Ngāti Mamoe. Ngāti Mamoe were to hold mana (authority) over the lands south of the river and Ngāi Tahu were to hold mana northwards. Eventually, the unions between the families of Te Hautapunui o Tū and Ngāti Mamoe were to overcome these boundaries. For Ngāi Tahu, histories such as this represent the links and continuity between past and present generations, reinforce tribal identity, and document the events which shaped Ngāi Tahu as an iwi.

Strategic marriages between hapū further strengthened the kupenga (net) of whakapapa, and thus rights to travel on and use the resources of the river. It is because of these patterns of activity that the river continues to be important to rūnanga located in Otago and beyond. These rūnanga carry the responsibilities of kaitiaki in relation to the area, and are represented by the tribal structure, Te Rūnanga o Ngāi Tahu.

Urupā and battlegrounds are located all along this river. One battleground, known as Te Kauae Whakatoro (downstream of Tuapeka), recalls a confrontation between Ngāi Tahu and Ngāti Mamoe that led to the armistice established by Te Hautapunui o Tū. Urupā are the resting places of Ngāi Tahu tūpuna and, as such, are the focus for whānau traditions. These are places holding the memories, traditions, victories and defeats of Ngāi Tahu tūpuna, and are frequently protected by secret locations.

The mauri of Mata-au represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the river.

Appendix 2

Text of Crown Apology

The following is text of the Crown apology contained in the Ngāi Tahu Claims Settlement Act 1998.

The text of the apology in English is as follows:

1. *The Crown recognises the protracted labours of the Ngāi Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years, as alluded to in the Ngāi Tahu proverb ‘He mahi kai takata, he mahi kai hoaka’ (‘It is work that consumes people, as greenstone consumes sandstone’). The Ngāi Tahu understanding of the Crown’s responsibilities conveyed to Queen Victoria by Matihā Tiramorehu in a petition in 1857, guided the Ngāi Tahu ancestors. Tiramorehu wrote:*

“This was the command thy love laid upon these Governors ... that the law be made one, that the commandments be made one, that the nation be made one, that the white skin be made just equal with the dark skin, and to lay down the love of thy graciousness to the Māori that they dwell happily ... and remember the power of thy name.”

The Crown hereby acknowledges the work of the Ngāi Tahu ancestors and makes this apology to them and to their descendants.

2. *The Crown acknowledges that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngāi Tahu in the purchases of Ngāi Tahu land. The Crown further acknowledges that in relation to the deeds of purchase it has failed in most material respects to honour its obligations to Ngāi Tahu as its Treaty partner, while it also failed to set aside adequate lands for Ngāi Tahu’s use, and to provide adequate economic and social resources for Ngāi Tahu.*
3. *The Crown acknowledges that, in breach of Article Two of the Treaty, it failed to preserve and protect Ngāi Tahu’s use and ownership of such of their land and valued possessions as they wished to retain.*
4. *The Crown recognises that it has failed to act towards Ngāi Tahu reasonably and with the utmost good faith in a manner consistent with the honour of the Crown. That failure is referred to in the Ngāi Tahu saying ‘Te Hapa o Niu Tirenī’ (‘The unfulfilled promise of New Zealand’). The Crown further recognises that its failure always to act in good faith deprived Ngāi Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty, a state referred to in the proverb ‘Te mate o te iwi’ (‘The malaise of the tribe’).*
5. *The Crown recognises that Ngāi Tahu has been consistently loyal to the Crown, and that the tribe has honoured its obligations and responsibilities under the Treaty of Waitangi and duties as citizens of the nation, especially, but not exclusively, in their active service in all of the major conflicts up to*

the present time to which New Zealand has sent troops. The Crown pays tribute to Ngāi Tahu's loyalty and to the contribution made by the tribe to the nation.

6. *The Crown expresses its profound regret and apologises unreservedly to all members of Ngāi Tahu Whānui for the suffering and hardship caused to Ngāi Tahu, and for the harmful effects which resulted to the welfare, economy and development of Ngāi Tahu as a tribe. The Crown acknowledges that such suffering, hardship and harmful effects resulted from its failures to honour its obligations to Ngāi Tahu under the deeds of purchase whereby it acquired Ngāi Tahu lands, to set aside adequate lands for the tribe's use, to allow reasonable access to traditional sources of food, to protect Ngāi Tahu's rights to pounamu and such other valued possessions as the tribe wished to retain, or to remedy effectually Ngāi Tahu's grievances.*
7. *The Crown apologises to Ngāi Tahu for its past failures to acknowledge Ngāi Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngāi Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui.*
8. *Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the historical grievances finally settled as to matters set out in the Deed of Settlement signed on 21 November 1997, to begin the process of healing and to enter a new age of co-operation with Ngāi Tahu.”*

Appendix 3

Te Mana o Te Wai – Otago Region

(excerpt from *Te Mana o te Wai – Te Wai Pounamu Case Study 2015*)

Te Mana o Te Wai

Water descends from our creation beliefs. The first mention of water is Te Mākū (moisture). Life came into being when Te Mākū mated with Mahoranuiātea, another form of water, and of this Rakinui was born. Rakinui had two wives, Poharuatepō and Papatūānuku. From the unions of Rakinui came the flora and fauna, the mountains and people. Kāi Tahu descends from Raki and his wives.

Kāi Tahu is therefore bound to the waters of Te Wai Pounamu through whakapapa.

Kāi Tahu classified water in a number of ways. Some of these categories include:

- Wai-Māori – pure water, water rich in mauri, used for cleansing and for ceremonial purposes.
- Wai-tai – sea water.
- waimanawa-whenua – water from under the land, aquifer /springs.
- waikarakia – water for ritual purposes.
- waitapu – sacred water, waters used for ceremonial purposes.

The point of difference for Kāi Tahu is the spiritual relationship with the environment. Kāi Tahu are connected through spiritual beliefs with the atua and the environment created by those atua. The mana and hauora of Kāi Tahu is inextricably interwoven with the mana and hauora of waterways.

Waterways embody the mana of Kāi Tahu, regardless of the extent to which they have been manipulated.

The lakes are the source of the South Island's water and the traditions link the earliest ancestors discovering and naming these great sources of pure water.

Further to these discovery associations are many tales of personification of the waterways with legendary and ancestral beings. For example the Clutha River is known as the Mata-au which is also the name of the taniwha who resided in Lake Wakatipu; and Waitaki, which means "waters crying", was considered by many to be a reference to the tears of Aoraki.

Other waterways have direct association with ancestors who have resided within or adjacent to them and it is important to note that every spring that was known to Kāi Tahu was named and recorded in the oral map of the South Island.

Water itself, but perhaps more accurately, the associated waterways had a myriad of uses for Māori that are a reflection of water use across human society. Water was used for drinking, food gathering, bathing, as a travel artery, recreation and ritual cultural practices.

When it came to use of a waterway, wetland, lake or lagoon then it is important to note that, in most instances, parts of a water body were dedicated to a particular use either in time or space.

In one water system, which was viewed as a single entity, there would be areas set aside for food gathering during the appropriate season, another area would be dedicated for religious rituals whilst yet another area may be for daily bathing. Such dedications could be repeated along the course of a single long river.

Practical means of affirming mana and rangatiratanga:

- Ki Uta Ki Tai (holistic approach);
- RMA: Develop 'Whole of River Protocol' with the Regional Council and the Local Authorities on the River;
- Clear objectives supported by planning documents to reinstate cultural icons (mahika kai, trails, place names, water quality and quantity, mana, protocols and ceremony);
- Kaitiaki role;
- Presence in the catchment;
- Reaffirming cultural connection and expertise.

Appendix 4

Iwi Management Plan Content

Kai Tahu ki Otago Natural Resource Management Plan 2005

3.2 KAITIAKITAKA AND MAURI

Kaitiakitaka is derived from the word “kaitiaki” which includes guardianship, care and wise management. The term has received recognition in Section 7(a) of the Resource Management Act 1991 and is defined in the Act as “*the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship*”.

Mauri is imbued in all things and is a special power derived from the Supreme Being. At birth the two parts of body and wairua are joined together as one by the mauri. On death the mauri is no longer able to bind these elements together and the physical and spiritual parts are separated. The forest, waters, the life supported by them, together with natural phenomena such as the mist, wind and rocks, possess a mauri or life force. The primary management principle for Māori is the protection of mauri or life-giving essence of an ecosystem from desecration.

Māori words such as kaitiakitaka, mauri, wairua and tikaka are expressive of customary concepts that are best understood in the context of the language and the culture they derive from. To reinterpret these meanings into the English language by its very nature loses significant context and meaning. To absorb such words into legal frameworks and create definitions to suit the legislative norm is reductive and creates a simplistic explanation. The Kai Tahu understanding of kaitiakitaka is much broader than that defined in the RMA 1991.

3.2.1 The Kaitiaki Te Kaitiaki

Prior to 1840 and the implementation of the new colonial order, it can be reasonably said that mana and kaitiakitaka were often synonymous. Iwi collectively protected to the fullest extent their territory and the resources in it, in concert with the affiliated hapū.

The whānau, hapū, and iwi maintained and developed their tikaka for the wellbeing of the people. It was the kaitiaki duty to protect and sustain the resources so they remained for their grandchildren

and their grandchildren’s grandchildren also, *mo a matou mokopuna ake tonu ake*. The bottom line for all decisions therefore was the sustainable management of the resource and the continuing well-being of the hau kāika.

The kaitiaki looked for signs in nature as the season progressed that indicated the potential for successful planting or hunting or the cessation of hunting or gathering. Mātauraka Māori developed out of close observation and an amount of trial and error. An example is that when the kukupa feasted on the miro, it was not only time to hunt the bird, but also to gather the fruit of the miro.

For Kai Tahu ki Otago kaitiakitaka is not only about the physical resources, it is about being manawhenua and maintaining a relationship to the spiritual dimension and influences of wairua and tapu.

Takata whenua traditionally invoked and exercised kaitiakitaka over the resources of the land and sea but a kaitiaki could take many forms and could be benevolent or malevolent.

The ruru was seen as the kaitiaki of the night, the kea kaitiaki of the inland fastness and the tōroa kaitiaki of the coast. This is recognised in the following whakataukī:

| | |
|------------------------------------|---|
| E hāparaki atu kea ki uta | <i>the screeching of kea far inland</i> |
| Ki ruru ki pō | <i>to owl the guardian of night</i> |
| Ki tōroa ki tai | <i>to tōroa along the coast</i> |
| Hai karere ā iwi ki tara rāwāhi rā | <i>these are our messenger birds who take our messages along the seas and beyond²²</i> |

In tradition, kaitiaki were sometimes said to have abilities to call on supernatural powers in guarding their charges. The great Kāti Māmoe rakātira Te Rakitauneke was said to have had a guardian taniwha called Matamata who lived on the Taieri Plain.

The mechanisms of the kaitiaki for enacting temporary or complete closure of a resource are rāhui and tapu. A rāhui can be declared and the boundaries of it defined sometimes by the placement of pou during the rāhui ceremony and a tapu laid down. If the tapu was considered strong enough no-one would dare violate it. The rāhui and tapu were enforced by the solidarity of the people and the mana of rakātira.

The customary exercise of mana and kaitiakitaka were eventually curbed partly as a result of the changing social order post-treaty and also to the lack of recognition in ensuing legislation and decrees firstly of the governor and later parliament until recent times. In spite of this however, Manawhenua have maintained much of their traditional environmental knowledge and the concept of kaitiakitaka.

3.2.3 *Kaitiakitaka Today Kaitiakitaka i Tēnei Wā*

Since the KTKO NRMP 1995 was printed, there has been a significant improvement in the capacity of Kāi Tahu ki Otago and Te Rūnanga o Ngāi Tahu to exercise kaitiakitaka. Firstly the KTKO NRMP 1995 provided a base from which a number of initiatives sprung, the preparation of the iwi plan in itself was a “growth spurt” that gave kaha to the role of kaitiaki. It informed all stakeholders, councils and consultants of the “position” Kāi Tahu ki Otago had on natural resource management matters. It also gave impetus to the concept of the iwi consultancy KTKO Ltd that opened in 1997. Of even greater significance is the advent of Te Rūnanga o Ngāi Tahu in 1996 and the Cultural Redress component of the Ngāi Tahu Claims Settlement Act 1998.

The KTKO NRMP 2005 is a continuing expression of kaitiakitaka for the Otago Region.

P48

“Safeguarding the life supporting capacity of air, water, soil, and ecosystems”

It is an inherited responsibility of Kāi Tahu ki Otago to ensure that the mauri of all taoka is healthy and strong, and that the life supporting capacity of these ecosystems is protected. The maintenance of the mauri is important for the health and wellbeing of all people, to maintain the vitality of culture, practices, values, and beliefs. Kaitiakitaka enshrines an obligation to safeguard the wellbeing of land, air, water, flora and fauna and biodiversity.

5.3.3 Wai Māori General Objectives

- i. The spiritual and cultural significance of water to Kāi Tahu ki Otago is recognised in all water management.
- ii. The waters of the Otago Catchment are healthy and support Kāi Tahu ki Otago customs.
- iii. There is no discharge of human waste directly to water.
- iv. Contaminants being discharged directly or indirectly to water are reduced.
- v. Flow regimes and water quality standards are consistent with the cultural values of Kāi Tahu ki Otago and are implemented throughout the Otago Region and lower Waitaki Catchment.
- vi. The unresolved issues surrounding water ownership are addressed.

5.3.4 Wai Māori General Policies

1. To require an assessment of instream values for all activities affecting water.
2. To promote the cultural importance of water to Kāi Tahu ki Otago in all water management within the Otago Region and Lower Waitaki Catchment.
3. To promote co-ordinated research into water-related issues that provides for Kāi Tahu ki Otago input.
4. To protect and restore the mauri of all water.
5. To encourage the use of the Cultural Health Index as a tool for monitoring waterways.⁵⁴
6. To oppose any further cross mixing of waters.
7. To promote to the Otago Regional Council and Environment Canterbury minimum flow levels, flow regimes, lake levels and lake operating levels for lakes and rivers that recognise and provide for Kāi Tahu ki Otago cultural values and the healthy functioning of associated ecosystems.

5.5 MAHIKA KAI AND BIODIVERSITY TE REREKA KĒTAKA O KĀ KAIAO ME TE MAHIKA KAI

5.5.1 Mahika Kai and Biodiversity Description

Our very distinctive and unique culture and lifestyle in the southern half of the South Island included permanent coastal settlements and seasonal migrations inland over often-vast distances to harvest and collect food and resources. The seasonal inland migrations were determined by whakapapa as to who could exercise those rights. This practice is referred to as “mahika kai” and became a corner-stone of our culture. Mahika kai is the basis of culture, and the unrelenting cultural imperative is to keep the mahika kai intact, to preserve its productivity and the diversity of species.

The term “mahika kai” literally means “food works”. It encompasses the ability to access the resource, the site where gathering occurs, the act of gathering and using resources, and ensuring the good health of the resource for future generations. This is enshrined in the Kāi Tahu proverbial saying and tribal motto - “Mo tatou, a mo ka uri I muri ake nei - for us and for the generation that come after us”.

The classic creation beliefs of the Kāi Tahu higher school of learning, as articulated by Tiramorehu of Moeraki in the 1880s, state that all whakapapa descend from Rakinui through important unions with Pokohuaratepo and then with Papatūānuku begot many offspring, some of whom became the spiritual guardians of the important domains, and who formed relationships with various natural elements, and the offspring of these unions maturing into the myriad forms of life we call koiora or diversity of life.

5.5.3 Mahika Kai and Biodiversity Objectives

- i. Habitats and the wider needs of mahika kai, taoka species and other species of importance to Kāi Tahu ki Otago are protected.
- ii. Mahika kai resources are healthy and abundant within the Otago Region.
- iii. Mahika kai is protected and managed in accordance with Kāi Tahu ki Otago tikaka.
- iv. Mahika kai sites and species are identified and recorded throughout the Otago Region.
- v. Indigenous plant and animal communities and the ecological processes that ensure their survival are recognised and protected to restore and improve indigenous biodiversity within the Otago Region.
- vi. To restore and enhance biodiversity with particular attention to fruiting trees so as to facilitate and encourage sustainable native bird populations.
- vii. To develop strategies and implementation plans for comprehensive control and/or eradication of pest species in targeted areas beyond conservation managed lands.
- viii. To provide for access to cultural materials and to support the development and promotion of a Cultural Materials Bank with the Department of Conservation.
- ix. To create a network of linked ecosystems for the retention of and sustainable utilisation by native flora and fauna.

5.5.4 Mahika Kai and Biodiversity General Policies

1. To promote catchment-based management programmes and models, such as Ki Uta Ki Tai.
2. To promote more stringent border control protection mechanisms.
3. To encourage collaborative research into indigenous biodiversity.
4. To require Kāi Tahu ki Otago participation in the management of mahika kai, both introduced and indigenous.
5. To identify mahika kai sites and species of importance to Kāi Tahu ki Otago.
6. To protect and enhance physical access for Kāi Tahu ki Otago to mahika kai sites.
7. To require that all assessments of effects on the environment include an assessment of the impacts of the proposed activity on mahika kai⁶⁰.
8. To promote the protection of remaining indigenous fish habitat by:
 - i. Identifying waterways that exclusively support indigenous fish.
 - ii. Prohibiting the introduction of exotic species where they currently do not exist.
 - iii. Ensuring fish passage (both ingress and egress).
 - iv. Removing exotic species from waterways of particular importance where this is achievable and appropriate according to Kāi Tahu ki Otago.
9. To promote the protection of traditional breeding stocks.
10. To encourage the transfer of knowledge through generations.
11. To promote the use of authorisation systems for the taking and use of cultural materials.
12. To protect and enhance existing wetlands, support the reinstatement of wetlands and promote assistance for landowners for fencing-off wetlands.
13. To promote the development of a cultural monitoring tool for vegetation and ecosystem health.
14. To encourage the creation of mahika kai parks in the Otago region.
15. To promote the reintroduction of locally extinct species of importance to Kāi Tahu ki Otago to the region.
16. To require that hazardous operations and the use, transportation and storage of hazardous substances are not to impact mahika kai and other cultural values.
17. To require that fish screens be fitted to all pumps and race intakes.
18. To promote best-practice methodologies for drain maintenance or diversions to ensure minimal damage to ecosystems with no further adverse effects on mahika kai and other cultural values.

Ngāi Tahu Freshwater Policy Statement 1999

3.0 KAUPAPA

Ngāi Tahu considers that the following principles should govern the formulation of water policies and plans within the rohe of Ngāi Tahu:

- Water plays a unique role in the traditional economy and culture of Ngāi Tahu. Without water no living thing, plant, fish or animal can survive.
- Water is a taonga. Water has an inherent value that should be recognised in the event of potentially competing uses. Taonga value refers to values associated with the water itself, the resources living in the water and the resources in the wider environs that are sustained by the water. Taking, using and disposing of water can have drastic effects on the environment and the values Ngāi Tahu accord to a waterbody.
- Water is a holistic resource. The complexity and interdependency of different parts of the hydrological system should be considered when developing policy and managing the water resource.
- Water is a commodity that is subject to competition. An understanding of the significance and value of water to Ngāi Tahu and other stakeholders is necessary to change the existing behaviour from one that prioritises consumptive uses and permits inefficient use towards one that recognises and provides for cultural and ecological values as priorities.
- Water has many stakeholders. The interdependency of different parts of the hydrological system creates many stakeholders, including other organisms and humans (both current and future generations). The RMA 1991 confirms that future generations are also stakeholders. From Ngāi Tahu's perspective, the present generation has an obligation to pass on healthy water resources to future generations.
- Water should be managed at the local level because most threats to waterbodies are local. Responsibility for management should therefore be delegated to those organisations that have a personal stake in its overall health and condition.

4.2.1 Mauri

Papatūānuku (Mother Earth) supports life including all people, flora and fauna. Waterways represent the blood vessels that supply nourishment to her and, through her, to all living things.

The primary management principle for Ngāi Tahu is the maintenance and enhancement of the mauri or life-giving essence of a resource.

With respect to waterways mauri can be tangibly represented in terms of elements of the physical health of a river ecosystem. While there are also many intangible qualities associated with the spiritual presence of the river, elements of physical health which Ngāi Tahu use to reflect the status of mauri and to identify the enhancements needed include:

- aesthetic qualities e.g. clarity, natural character and indigenous flora and fauna;
- life-supporting capacity and ecosystem robustness;
- depth and velocity of flow;
- continuity of flow from the mountain source of a river to the sea;
- fitness for cultural usage; and
- productive capacity.

The mauri should not be desecrated. Resource management agencies need to be aware that natural disasters cannot harm the mauri only those resulting from the actions of man. The mauri of a waterway is unable to protect itself against unnatural aspects of the environment. If the mauri of an entity is desecrated or defiled, the resource itself, resource users and others depending on that entity are at risk.

Sadly, the mauri of many waterbodies have been seriously eroded by water use and development including:

- The damming of the rivers;
- Abstracting water from rivers, streams and lakes;
- The diverting of the waters;
- Mixing the waters of distinct ecosystems; and
- River protection works.

Te Rūnanga o Ngāi Tahu is concerned that human activities have altered the frequency and intensity of natural change. Tangata tiaki over the years have come to realise that every time the processes and functioning of a river are altered the river system is weakened. If enough adverse changes occur the mauri of the river will die.

Resource managers must recognise that each waterbody has its own mauri, guarded by separate spiritual guardians, its own mana and its own set of associated values and uses.

Activities have the potential to degrade or extinguish the mauri of the waterbody and as a result may offend the mana of Papatipu Rūnanga who hold traditional rights and responsibilities with respect to that waterbody. The mauri of the river is degraded if it no longer has the capacity to support traditional uses and values. Across the rohe, one of the principal indicators by which Ngāi Tahu assesses the mauri of a waterbody is its productivity of the food and other materials sourced from it. Each Rūnanga has specific examples of rivers, streams, lakes and wetlands where the mauri is degraded. Further they can identify the activities that have adversely affected the mauri and the actions that must be taken to restore the mauri.

Restorative action will need to be determined with Papatipu Rūnanga on a case by case basis but will include:

- establishing minimum flow levels that afford protection to instream values;
- prohibiting the direct discharge of point source contaminants to water;
- prohibiting the unnatural mixing of water sourced from different waterbodies;
- developing comprehensive strategies, including regulatory measures, to address non point source pollution; and
- developing with Rūnanga a programme for habitat restoration, particularly in riparian margins.

Restorative action is a priority, particularly for waterbodies of high original ecological or cultural value.

4.2.2 Kaitiakitanga

Preservation of the integrity of valued waterways is an important aspect of the responsibilities of those members of Ngāi Tahu Whānui that are identified as the Tangata tiaki. Values (both tangible and intangible) associated with specific waterbodies include:

- the role of particular waterways in unique tribal creation stories;
- the role of those waterways in historical accounts;
- the proximity of important wāhi tapu, settlement or other historical sites in or adjacent to specific waterways;
- the use of waterways as access routes or transport courses;
- the value of waterways as traditional sources of mahinga kai food and other cultural materials; and
- the continued capacity for future generations to access, use and protect the resource.

4.3.1 Water quantity

Protecting the mauri of a waterbody requires:

- protection of water's capacity to renew its groundwater and surface water flows and stocks;
- instream flows sufficient to sustain mahinga kai species and habitats in their freshwater and coastal environs;
- development of flow regime that incorporate a minimum flow and flow variability. Streams and rivers are supposed to experience a range of flows and seasonal "floods" of different magnitudes;
- Protection of the exchange of freshwater and seawater at the river mouth. Inappropriate flow regimes can lead to reduced freshwater flows in estuaries, salt intrusion and changes to the overall character and mauri of the waterbody. Of greater concern are the instances where the river mouth closes unnaturally as a result of insufficient flows in the river; and
- prohibiting flow augmentation schemes, where such augmentation involves the unnatural⁴ mixing of waters from different waterbodies.

Ngāi Tahu strongly believe that in the past, the instream environment, and in particular values such as the protection of mauri, have not been considered and by default have been accorded the lowest priority in the allocation of water. Observable effects in the South Island include low flows, saltwater intrusion into areas beyond the usual tidal reaches of a river, changes in sediment deposition patterns, unnatural drying out of significant sites, reduced seasonal flushing and floods, increased fluctuations in water levels and changes in sedimentation patterns.

Overseas the tide is turning, and the value of environmental water use is increasingly recognised and protected. Ngāi Tahu wants to see a commitment to restoration and enhancement being made by the resource management agencies it works with.

In order of priority, the values that Ngāi Tahu wants to see protected when developing water allocation regimes are:

1. *sustaining the mauri of the waterbody;*
2. *meeting the basic health and safety needs of humans, specifically the provision of freshwater for drinking water;*
3. *protecting traditional cultural values and uses (in addition to its mauri);*
4. *protecting other instream values and uses (including indigenous flora and fauna);*
5. *meeting the health and safety needs of humans, with respect to water for sanitation purposes;*
6. *providing water for stock;*
7. *providing for economic activities including other abstractive uses; and*
8. *other uses.*

Resource management agencies have to work with Papatipu Rūnanga to ensure that sufficient water, of the right quality, is available for cultural purposes. Together with Papatipu Rūnanga they will need to assess a number of options including:

- *resource appraisal, e.g. making a comprehensive assessment of the flow requirements necessary to protect cultural values;*
- *regulation, e.g. developing appropriate minimum flow regimes that are not based on the premise that the starting point is to determine the amount of water needed for consumptive uses; and*
- *investment, e.g. promoting investment in efficient measures e.g. water harvesting techniques, more efficient equipment etc.*

When considering what is an acceptable minimum flow Papatipu Rūnanga will want to know:

- How much water is there?
- How much is needed to protect mahinga kai species and habitats?
- How much is sought by abstractors?
- How the current low flows and the proposed minimum flow relate to natural low flow conditions.

The issue of inadequate minimum flows is a concern that is shared by all Rūnanga. Waterbodies are affected by serious competition from industrial, household and agricultural users. Ngāi Tahu considers that the instream and environmental value of this water exceeds the value of water in some of its other uses and this should be recognised when determining an appropriate allocation regime.

Irrigation is one of the most consumptive uses of water. Unfortunately many of the quantities abstracted are based on historical patterns of usage. Councils should be proactive in requiring a more efficient use of water resources, e.g. water harvesting techniques, and requiring farmers, in the assessment of environmental effects that accompanies resource consents, to justify the quantities of

water taken. The amount taken by farmers should be based on efficient norms for the area cultivated, the crop mix, and the water requirements of each crop. Each take should be metered.

...

Throughout the rohe there are examples of catchments where flows, because of the extent of abstractive uses, are kept close to or below the identified minimum flow for a significant period of time. Ngāi Tahu, however, recognises that it must take into consideration natural low flow conditions.

In determining flow regimes consideration must be given to seasonal flow variability. However, where a waterbody is controlled resource managers need to ensure that flood flows are proportional to the minimum flows in the river, to ensure that large floods do not destroy aquatic ecosystems. Ramping rates sensitive to the needs of the instream environment may need to be determined. From Ngāi Tahu's perspective, across the rohe, there is insufficient attention given to flow variability.

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Ngā hua o te whenua

Ngā hua o Tāne me ngā uri o Tangaroa

Mahinga kai refers to the resources of the land, and the resources from the bush and the forests. This includes all birds and animals dependent upon these resources. The uri o Tangaroa refers to all living things within the waterways which include all water be it lake, river, lagoon or seawater.

Mahinga kai was and remains one of the cornerstones of Ngāi Tahu existence and culture. Survival was dependent upon knowledge of mahinga kai and the ability to gather resources from the land, waterbodies and the sea. Healthy waterbodies continue to be a direct source of mahinga kāi, provide ecosystem support for mahinga kai species and support other significant mahinga kai environments such as forests, riparian habitats and coastal environs. Sadly there are many examples across the rohe where inappropriate water management has impacted adversely on mahinga kāi. Observable effects include alterations to the abundance and distribution of species, disturbances to the breeding cycles and patterns, loss of access to waterbodies, and the deterioration, reduction and removal of habitat.

Ensuring the health and wellbeing of freshwater is a prerequisite for ensuring the continued health and wellbeing of mahinga kai resources and ultimately the people. Papatipu Rūnanga are likely to accord special value to a waterbody that:

- provides significant habitats for important food species and materials such as eels, watercress, flax etc;
- affords breeding and migratory environments for those species and the species they feed on e.g. wetlands and lagoons;
- has long-standing use histories for whānau, hapū and iwi; or
- deserves protection because it safeguards critical habitats, protects robust ecosystems or represents degraded mahinga kai environments that are in need of restoration.

For Ngāi Tahu Whānui today, participation in mahinga kai activities is an important expression of cultural identity. Continuation of traditional practices is an important means of passing values down to children and grandchildren, ensuring their survival through the generations.

The protection of mahinga kai resources will require resource managers to consult with Papatipu Rūnanga to establish:

- *the species that are of particular significance;*
- *the locations within a catchment that require specific protection; and*
- *the means by which mahinga kai values are to be protected and not compromised by diversion, extraction, other competing uses for the water and activities within the bed of the lake/river..*

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| 6.2 PRIORITY | | MAURI |
|---------------------|--|---|
| OBJECTIVE | POLICIES | |
| | <p>Restore, maintain and protect the mauri of freshwater resources</p> | <ol style="list-style-type: none"> 1. Identify freshwater resources where: <ul style="list-style-type: none"> • mauri is unaffected by modification and human activity so that these waterbodies can be afforded total protection; and • mauri is adversely affected, and the activities that cause such effects. 2. Accord priority to ensuring the availability of sufficient quantities of water of appropriate water quality to restore, maintain and protect the mauri of a waterbody, in particular priority is to be accorded when developing water allocation regimes. 3. Adopt catchment management planning as one of the means of achieving integrated management. 4. Protect the opportunities for Ngāi Tahu's uses of freshwater resources in the future. |

| 6.3 PRIORITY | MAHINGA KAI |
|---|--|
| <p>OBJECTIVE</p> <p>To maintain vital, healthy mahinga kai populations and habitats capable of sustaining harvesting activity.</p> | <p>POLICIES</p> <ol style="list-style-type: none"> 1. Protect critical mahinga kai habitats and identified representative areas. 2. Restore and enhance the mahinga kai values of lakes, rivers, streams, wetlands, estuaries and riparian margins. 3. Ensure that activities in the upper catchments have no adverse effect on mahinga kai resources in the lower catchments. 4. Restore access to freshwater resources for cultural activities, including the harvest of mahinga kai. |

| 6.4 PRIORITY | KAITIAKITANGA |
|--|---|
| <p>OBJECTIVE</p> <p>To promote collaborative management initiatives that enable the active participation of Ngāi Tahu in freshwater management.</p> | <p>POLICIES</p> <p>To encourage agencies to:</p> <ol style="list-style-type: none"> 1. Ensure Ngāi Tahu has access to information about the status of resources and the activities of resource users so that it is able to anticipate the effects of activities on customary values and uses. 2. Assist with the development of Ngāi Tahu's capacity to conduct formal cultural impact assessments and require such assessments as part of an assessment of environmental effects. 3. Facilitate effective Ngāi Tahu participation in: <ul style="list-style-type: none"> • Policy formulation; • Decision making; • Operational management activities; and • Monitoring activities. 4. Improve the integration of western science and traditional local knowledge in order to develop a better understanding of all water use planning related matters. 5. Increase the ability of Papatipu Rūnanga to understand and participate in all aspects of research and to influence the setting of research priorities. |

